IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 388

MARGARET BOLLINGER and
CHARLES W. BOLLINGER,
Petitioners,

against

GOTHAM GARAGE COMPANY,
Respondent.

ON APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of Facts

The accident occurred about 3:00 A. M. (6). From 8:00 P. M. the previous evening plaintiffs, petitioners, had taxied around to various night clubs, known to Mrs. Bollinger (47-8, 69-70, 98, 197). Bollinger said that after midnight he and his wife had two scotch and sodas, and Mrs. Bollinger said two rye highballs (99, 125). None of

the party had ever before been to respondent's garage, and Pierce had never before stored his car there (17, 25, 56, 73, 100). Pierce stepped ahead of the ladies and at the office entrance gave his ticket to the attendant, who disappeared immediately into the rear of the garage (17, 26, 30). Bollinger saw the attendant start toward the rear, but no one saw him again before the accident (100-1, 74, 145-6, 63). They understood the car was on an upper floor (63, 74). Bollinger asked Pierce where the men's room was and Pierce did not know, told him to ask the attendant (19, 31, 71). After taking a step or two Mrs. Bollinger called to him and he waited for her, she wanted to go to a ladies' lounge, so they went off together (71, 102, 111, 127). Neither his nor her errand was urgent (101, 147). The walls were whitewashed (18). He could see clearly and even walked at the side of the shaft, but did not walk into it (103, 108).

Mrs. Bollinger has an excellent memory, but the details up to the time she fell into the pit were very vague and confused, and after her examination before trial she discussed the questions and answers and what really happened with her husband and her lawyer, after which changes in eleven questions and answers were made in her lawyer's office (159, 164-6, 168, 170-2, 175, 181-2). She was not in a hurry and could see where she was going; she stopped just beyond the basin at the edge of the shaft, then took one step in some direction and stepped into space (127-8, 147-9, 163-4, 183, 195). Her impression that the pit was black comes entirely from her fall (171, 187).

Mrs. Moore, her mother, watched what her daughter drank, because she did not want her drinking (56). Standing at X on Exhibit B, she could plainly see the two walking toward the rear of the garage, and after her daughter screamed, could see Bollinger near the edge of the pit, and with no difficulty rushed over to him (53, 56-9, 61, 64).

Pierce has no vision in his left eye (33). As he ran back, he could see the sink, the different shades in black between the floor and the elevator shaft, and before getting there, saw Bollinger at the edge of the shaft, where he put an ink circle on Exhibit B (21, 32-4, 42).

Poccia had worked in the garage for 20 years (120). Though he was in court, plaintiffs' counsel read from his deposition (117-123). The building and lift were very old (200, 122). During the dim-out there were fixtures, but no light in the garage (119-120, 123). He saw no one but Pierce and never saw anyone come into the garage (122-3). Both sides in effect rested at the close of plaintiffs' case, respondent merely offering the official dim-out regulations, of which the Court took judicial notice (200).

The Trial Court held that Mrs. Bollinger was an invitee at the premises, a licensee in the garage and at no time a trespasser, plaintiffs making no request to have her status determined as a question of fact, and submitted all questions of negligence to the jury (211, 216).

This case is of no general importance, as under the decisions in this State and the Restatement of the Law of Torts, the status of persons on the property of another is well defined, and in the absence of conflicting evidence is usually determined as a matter of law. The Circuit Court has in no way departed from established procedure, and the opinion of Judge SWAN is in accord with established law (155 F. (2) 326).

POINT I

The Circuit Court of Appeals violated no right of plaint.ffs in dismissing the complaint, as there was no proof of any actionable negligence on the part of respondent.

The status of persons on the premises of another, and the duty owing to each class, have been clearly defined by both the American Law Institute in its Restatement of the Law of Torts, Secs. 329 *et seq.*, and the Comments thereunder, and in the decisions of this State as hereinafter shown.

It was plaintiffs' burden to both plead and prove facts to show Mrs. Bollinger's status at the place where she was when injured, and that defendant owed her some duty it failed to perform. The allegations in the complaint are insufficient for either purpose.

> *Klippel* v. *Weil,* 204 App. Div. 323;
> *Minnelli* v. *Marotta,* 212 App. Div. 834;
> *Panken* v. *Holly,* 146 App. Div. 947;
> *Galbraith* v. *Busch,* 267 N. Y. 230.

On the record both Courts have been kinder to plaintiffs than they could reasonably expect, in holding them to be licensees in the garage, as the essentials necessary to constitute one a licensee are lacking. For, as said in the Restatement of the Law of Torts, Sec. 343(b):

> "If the business visitor goes outside of the area of his business invitation, he becomes either a trespasser, a social guest, or a bare licensee depending upon whether he goes thereon without the consent of the possessor or by the possessor's consent or permission given merely as a favor to him."

And in *Meiers* v. *Koch Brewery*, 229 N. Y. 10:

> "A license involves the ideas of permission on the one side—its acceptance on the other * * * consent is but one side of the shield. Acceptance is the other."

And *Hensel* v. *Hensel Yellow Cab*, 245 N. W. 159:

> "The one essential of a license is that it be assented to by the licensor. * * * Where a person is upon the property of another with the other's knowledge, that is sufficient to establish the relationship."

And *Babcock* v. *Nolton*, 71 P. 2, 1051:

> "In order that a person may have the status of a licensee the owner or person in charge of the premises must have knowledge of his entry or his presence thereon, or of a customary use of the particular portion of the property used for the purpose for which such person is using it."

See also:

King v. *Yancey*, 53 Fed. Supp. 510;
Restatement of the Law of Torts, Sec. 330.

There was no proof of permission, acceptance or assent, and no proof of knowledge or of a customary or any use of the interior of the garage for the purpose for which plaintiffs were using it, or of any use by customers. In fact, the record shows affirmatively that the attendant never saw anyone but Pierce, that plaintiffs without the permission or knowledge of the attendant, and in his absence, started on their own to explore the interior of the unfamiliar garage to see if there was a toilet. So far as appears, there was no toilet there; no one had ever before gone into the garage in search of one, and there were no signs or anything anywhere indicating that anyone's presence was permitted in the garage for either that or any

purpose. There was no light in the garage, which of itself indicated that people were not intended to wander in there. Further, on the trial, though Poccia was in Court, plaintiffs chose not to ask him whether there was a toilet, or whether anyone had ever before roamed around in the garage, but read his testimony describing in detail the lift and the garage floor, with no reference whatever to the presence or absence of a toilet.

However, as the Court held that plaintiffs were licensees, the duty owing to a licensee must be considered. The duty owing to licensees and trespassers is so nearly the same that the Courts often include both when stating the duty. This duty is defined in *Sanders* v. *Favorable R. Corp.*, 290 N. Y. 591 as follows:

> "It is fundamental that the only duty owing by an owner of land to trespassers or bare licensees going thereon is to abstain from inflicting wanton, intentional or wilful injuries."

See also:

> *Mendelowitz* v. *Neisner*, 258 N. Y. 181;
> *Rasmussen* v. *Palmer*, 134 F. (2) 780.

The distinction between the duty owed to a licensee and that owed to a trespasser has been stated in *Barrett* v. *Brooklyn Heights R.R. Co.*, 188 App. Div. 109, aff'd 231 N. Y. 605:

> "Notwithstanding the expressions found in some authorities in which a licensee is placed in the same category as a trespasser with reference to the duty that the owner of the premises owes, we think there is a distinction. The owner of the premises owes to a trespasser no duty except to refrain from intentionally or wantonly injuring him * * * To a licensee the owner * * * owes no duty to exercise care that the premises are safe, for the licensee, in entering *by permission*, takes the risk of their condition * * *." (Italics ours.)

And in *Ramage* v. *Thomas*, 44 P. 2, 19, 172 Okl. 24:

> "We see no distinction as to the duty owed either to a licensee or a trespasser, except, of course, there is a higher duty owed to a licensee of anticipating his presence and protecting him accordingly by the use of ordinary care against a known danger."

And in *Central of Georgia* v. *Ledbetter*, 168 S. E. 81:

> "In the case of a licensee: There is a slightly higher duty on the part of the owner or proprietor of the premises * * * since his presence as a result of his license is at all times probable, and some care must be taken to anticipate his presence, and ordinary care and diligence must be used to prevent injuring him after his presence is known or reasonably should be anticipated."

Thus, whether trespasser or licensee, no duty to use ordinary care not to injure him by an act of affirmative negligence is owed unless and until a defendant has knowledge of his presence in the premises, which the plaintiffs here neither claim nor prove. As said in *Gotch* v. *K. & B. &c. Co.*, 25 P. 2, 719, 93 Colo. 276, 89 A. L. R. 753:

> "Trespassers or mere licensees take the premises as they find them. To them he (the occupier), is under obligation not willfully and intentionally to injure them or as it is sometimes expressed not to injure them after becoming aware of their presence. Of course, he must exercise reasonable care after becoming aware of their presence not to injure them by any affirmative act or force set in motion." (Cases cited.)

And in *Weighmink* v. *Harrington*, 264 N. W. 845, 274 Mich. 409:

> "* * * after the owner of premises is aware of the presence of a trespasser or licensee, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence."

And in *Lindholm* v. *N. W. Pac. R. Co.*, 248 P. 1033, 79 Cal. Ap. 34:

> "The facts of the cases just cited show, however, that the application of the rule contended for by appellant (that defendant owed duty of ordinary care to protect a licensee) is grounded upon evidence showing that the licensor was or had good reason to be aware of the presence of the licensee in the place of danger. Under such circumstances, it may be conceded that the owner is charged with the duty of exercising reasonable care to avoid injury to the licensee by any active or overt act of negligence."

Stating the same law are, among many other cases:

Texas &c. Co. v. *Bridges*, 110 S. W. 2, 1248;
Mann v. *Des Moines*, 7 N. W. 2, 45;
Ward v. *Avery*, 155 A. 502, 113 Conn. 394;
Amblo v. *Vt. &c. Corp.*, 144 A. 460, 101 Vt. 448;
Wurm v. *Allen Cadillac*, 17 N. E. 2, 305;
Babcock v. *Nolton, supra.*

Again, the duty of the defendant was only to keep the place reasonably safe for the purpose for which it was maintained

Garthe v. *Ruppert*, 264 N. Y. 290,

and one is not required to maintain its premises so that even an invitee can wander at will over them.

Seel v. *City*, 179 App. Div. 659;
Mendelowitz v. *Neisner, supra;*
Flanagan v. *Atl. Asphalt Co.*, 37 App. Div. 476;
Medcraft v. *Merchants Exchange*, 295 P. 822, 211 Cal. 404;
Johnson v. *Dietrich*, 279 N. Y. 664;
Restatement of Law of Torts, Sec. 343, Comment (B).

There is no evidence that appellant failed in any duty, for there is no evidence that it knew or had any reason to anticipate that plaintiffs were at or would be in the garage, no evidence that anyone ever before had gone into the garage or was or had ever been expected to.

See:

De Salvo v. *Stanley Mark &c. Corp.*, 281 N. Y. 333;
Weitzmann v. *Barber*, 190 N. Y. 452;
Berlin Mills v. *Croteau*, 88 F. 860.

It has been held over and over again that whether trespasser or licensee, one who blunders into an obstruction or pitfall on a defendant's premises as plaintiff claims she did, may not recover for injuries so sustained:

> "A licensee who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries sustained by obstructions or pit falls. An open hole in the earth, which is not concealed otherwise than by the darkness of the night, is a danger which a mere licensee going upon the land must avoid at his peril."

McCann v. *Thilemann*, 36 Misc. 145, aff'd 74 App. Div. 630.

And in *Gumbart* v. *Waterbury*, 28 F. Supp. 170, the Court quoting with approval the opinion of Judge HINCKS in the same case:

> "Even if the complaint be deemed to show a hidden danger on defendant's premises, it is still insufficient in that it fails to show that defendants knew or should have known that persons without invitation or license were constantly using the window for entrance * * * or that such persons were about to attempt such an entry."

And in *Ridley* v. *Nat'l Casket Co.*, 161 Su
App. Div. 954, where a licensee opened
that should have been locked, and fell:

> "• • • any failure of the defend
> elevator door, as was usual in such
> establish failure on the part of
> observe any care or prudence that
> defendant to the plaintiff under the

To same effect:

> *King* v. *Yancey, supra;*
> *Fox* v. *Warner-Quinlan*, 204 N.
> *Garthe* v. *Ruppert, supra;*
> *Vaughan* v. *Transit Dev. Co.*, 22
> *Lyon* v. *Socony*, 293 N. Y. 930;
> *Brigman* v. *Fiske*, 136 S. E. 125,
> *Medcraft* v. *Merchants Exchange*

See also:

> *Hamblet* v. *Buffalo*, 222 App. Di
> *Gordon* v. *Waters*, 168 A. 846, 1
> *Murphy* v. *Huntley*, 146 N. E. 7
> *Castoriano* v. *Miller*, 15 Misc. 2
> *Hamakawa* v. *Crescent*, 50 P. 2,

Though the Court charged in regard t
no question as to light in the case. Ther
duty at common law to light one's premis

> *Stacy* v. *Shapiro*, 212 App. Div.
> *McCabe* v. *Mackay*, 253 N. Y. 44

And Pierce could see well enough to run
the very edge of the pit, though he had
right eye, Mrs. Moore saw well enough
over to its edge, Bollinger saw well enou

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L. R. 773;

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Cal. 2, 499.

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to fall into

it, though he stood at its edge, and Mrs. Bollinger did not have the feeling of walking into darkness until she stepped into the pit; her only impression of blackness came entirely from her fall (171).

And the pit cannot in any respect be considered a trap, for as said in *Gumbart* v. *Waterbury, supra,* quoting from an opinion by Judge HINCKS:

> "* * * a trap imports an affirmative intent or design, either malicious or mischievous, to cause injury."

A trap is something wilful, which will "probably" endanger human life.

Jaffy v. *N. Y. C. &c. R. R. Co.,* 118 Misc. 147.

Therefore, as no actionable negligence was proved on the part of respondent the complaint was properly dismissed.

Emerich, as Admr. v. *N. Y. C. R. R. Co.,* 295 N. Y. 932.

The Trial Court in submitting the case to the jury relied chiefly on the case of *Warner* v. *Lucey,* 207 App. Div. 241, aff'd 238 N. Y. 638. But in that case, the plaintiff, to defendant's attendant's knowledge, was riding on the elevator with the car and its owner, while the car was being lowered in the garage, and defendant knew the elevator was not fit for its intended use. No question as to plaintiff's status was involved, and the case is readily seen to have no application here.

The cases cited by plaintiffs are obviously no authority for holding that the Circuit Court erred in dismissing the complaint. In all of them there was either a violation of a statute, an assurance of safety, or plaintiff was where he or other people were expected to be by custom, right, or

permission. A discussion of all of them would be lengthy and serve no purpose. Reference to a few will suffice. *Christiansen* v. *Hannon, Grassman* v. *Fromm, Hente* v. *Shercoop, McRickard* v. *Flint,* involved a statutory violation, and Grassmann and Christiansen an assurance of safety; *Meiers* v. *Koch Brewery* and *Plunkett* v. *Dick,* involved firemen injured in line of duty; *Haverstick* v. *Hansen,* a grating on plaintiff's premises she was accustomed to use, broken by defendant who made repairs; *Hyde* v. *Maison Hortense,* specific but erroneous instructions given by defendants' employee; in *Sackheim* v. *Pigueron* and *Stump* v. *Burns,* plaintiffs' intestates were in an office building or apartment house, attempting to use elevators they were expected to use.

That there is a distinction between active and passive negligence in New York, as elsewhere, is not disputed, but before there can be actionable negligence of any kind there must, of course, be a duty owed to the one injured.

The Circuit Court in its opinion most obviously did not, as the plaintiffs say it did, state that plaintiffs could not recover because they were licensees, or that plaintiffs were ever "in" the garage office. Nor did it state that the status of plaintiffs and whether they were permitted to go outside of the area of invitation were decided by the jury. The Circuit Court did not misread the record. Further, the two cases cited by it in its opinion, *Sanders* v. *Favorable R. Corp.,* and *Hudson* v. *Church of Holy Trinity,* were cited to show the duty owed to a licensee, as clearly appears from the opinion.

What plaintiffs in their papers mean by a different standard of liability for organized undertakings etc., than for others, is incomprehensible. Nowhere in the New York Civil Practice Act or in the decisions of the courts, is there any such holding. It is possible that plaintiffs' remark was inspired by the fact that Mr. Bollinger is in the insur-

ance business, and writes risks covering elevators (94-5, 97), but in any event plaintiffs' remarks have nothing to do with any issue here involved.

As plaintiffs did not prove failure on the part of respondent as to any duty owing to them, even considering them as licensees, the Circuit Court was correct in dismissing the complaint and the plaintiffs are not entitled to a writ herein.

POINT II

Neither the District Court nor the Circuit Court lacked the power to determine the status of plaintiffs as matter of law.

It is fundamental that at least in the absence of conflicting testimony both the Trial Court and the Appellate Court have the power to determine a plaintiff's status as matter of law. This power has been exercised over and over again in a great variety of cases.

Vaughn v. *Transit Dev. Co.*, 222 N. Y. 79;
Paquet v. *Barker*, 250 App. Div. 771;
Mendelowitz v. *Neisner*, 258 N. Y. 181;
Garthe v. *Ruppert*, 264 N. Y. 290;
Walker v. *Bachman*, 268 N. Y. 294;
Johnson v. *Dietrich*, 279 N. Y. 664;
Hudson v. *Church*, 250 N. Y. 513;
Sanders v. *Favorable*, 290 N. Y. 591;
Myer v. *Pleshkoff*, 277 N. Y. 576;
Vega v. *Lange*, 248 App. Div. 521;
Roth v. *Prudential*, 266 App. Div. 872;
Rasmussen v. *Palmer*, 134 F. 2, 780;
King v. *Yancey*, 53 F. Supp. 510;
Gumbart v. *Waterbury*, 28 Fed. Supp. 170.

There was no conflict in the testimony here. Both sides in effect rested at the close of plaintiffs' case, respondent merely offering the official dim-out regulations, of which the Trial Court took judicial notice. Therefore, under the definitions of invitee, licensee and trespasser set forth in the above cases, as well as in the previous cases cited in this brief and in the Restatement of the Law of Torts, both Courts not only had the right to determine plaintiffs' status as matter of law, but as hereinbefore shown, were kinder to them than they could reasonably expect, in holding them to be licensees at the place where Mrs. Bollinger was injured.

Furthermore, plaintiffs made no objection to the Trial Court's determining the status of plaintiffs as matter of law, and made no motion to have their status submitted to the jury as a question of fact.

The cases cited by plaintiffs in no way require submission of these plaintiffs' status to the jury:

In *McNally* v. *Oakwood,* the record shows that the trap door was always open, that the public was not excluded from the room, but went there in connection with their purchases of cut flowers, and that defendant's employee knew plaintiff was in this room and was interested in the flowers in the window cabinet beneath which the open trap door was.

In *Grassmann* v. *Fromm,* 292 N. Y. 699, plaintiff returned after hours to a building where he worked, to the knowledge of defendant's watchman, and the testimony was wholly conflicting. In *Collentine* v. *City,* a public playground with a known defective and dangerous structure was involved; also the propensity of children to climb about and play; the Court held only that the questions of negligence should be submitted to the jury.

Rather does this case come within the holding in the case of *Polemenakos* v. *Cohn,* 234 App. Div. 563, aff'd 260 N. Y. 524, in which the Court stated:

> Defendants' "duty stopped with making the place reasonably safe for the purposes for which it was accustomed to be used, or for any purpose for which they had reason to apprehend that it would be used. They were not bound to guard against an unexpected or unheard of event, or to foresee every possible accident which might occur."

POINT III

The Circuit Court did not exceed its powers in dismissing the complaint.

The Seventh Amendment does not guarantee anyone a trial by jury unless he has first made out a cause of action. Referring to this Amendment, this Court stated, in *Galloway* v. *U. S.*, 319 U. S. 372, 389, 87 L. Ed. 1458, 1470:

> "If the intention is to claim generally that the amendment deprived the Federal Courts of power to direct a verdict for insufficiency of evidence a short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."

And in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636:

> "the aim of the Amendment • • • is • • • particularly to retain the common law distinction between the province of the Court and that of the jury whereby • • • issues of law are to be resolved by the Court and issues of fact are to be determined by the jury."

Whether plaintiff's evidence in a jury case makes out a cause of action is solely a question of law.

Schad v. *20th Century Fox*, 136 F. 2, 991.

The instant case failed for insufficiency of evidence, failure to make out a cause of action, therefore, plaintiffs were not deprived of any right under this Amendment.

Under Rule 50(b) of the Federal Rules of Practice, the District Court has the power to dismiss a complaint for insufficient evidence where a motion for a directed verdict or its equivalent was made at the trial, and no set words or formula is required. As said in *Ryan Distributing Corp.* v. *Caley,* 147 F. 2nd 138, 140, where it was claimed that a proper motion under the rule was not made:

> "• • • technical precision need (not) be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. Virginia-Carolina Tie & Wood Co., Inc., v. Dunbar et al., 4 Cir., 1939, 106 F. 2nd 383, 385. The basis of the motion was perfectly clear to both court and parties both in the trial court and upon this appeal."

And in *Zurich Gen. Acc. L. Ins. Co.* v. *Mid-Continent P. Corp.,* 43 F. 2nd 355:

> "But questions of law are open to review, and it was a question of law whether there was substantial evidence to uphold the finding of the Trial Court. It was needful for the appellant to request or move for a declaration of law, or to take an equivalent step in the Trial Court. Wear v. Imperial Window Glass Co. (C. C. A.) 224 F. 60. But the plaintiff moved for judgment upon the evidence, the motion was denied, and an exception was reserved. And that motion raised a question of law for review as to the sufficiency of the evidence."

Here respondent moved both at the close of plaintiffs' case and at the close of the entire case (respondent putting in no proof), for a dismissal of the complaint on the specific grounds among others, of failure of proof, and failure to prove a cause of action, and duly excepted to the denial of its said motions (199-200, 202). Certainly said motions raised the question of the sufficiency of the evidence as much as a motion for a directed verdict could have done, and was in every way its "equivalent."

At least three cases have come before this Court where the petitioners squarely raised the question whether failure to literally comply with this Rule could authorize a dismissal of the complaint, namely:

Berry v. *U. S.*, 2 Cir. 1940, 111 F. 2nd 615, rev. on other grounds 1941, 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945;

Conway v. *O'Brien*, 2 Cir. 1940, 111 F. 2nd 611, Rev. on other grounds 1941, 312 U. S. 492, 61 S. Ct. 634, 85 L. Ed. 969;

U. S. v. *Halliday*, 4 Cir. 1941, 116 F. 2nd 812, Rev. on other grounds 1942, 315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. 711.

In all three cases this Court stated that it was not passing on this matter, holding that each case could be disposed of on its particular facts. In the *Berry* case this Court expressly stated that "the Circuit Court of Appeals are not in complete agreement" as to the meaning of this rule.

In this connection it is to be noted that the Advisory Committee on Federal Rules for Civil Procedure and Walter P. Armstrong, former president of the American Bar Association, have formally recognized that this rule is ambiguous, and are seeking to remove the ambiguity. See 4 Federal Rules Decisions 125.

In referring to Rule 50(b) they state:

> "Expressly sanctioned is the interpretation of the Circuit Courts of Appeal as permitting an order for final judgment in accordance with the motion for a directed verdict, although in the District Court there was no such action either on motion or sua sponte."

Citing:

Conway v. *O'Brien*, 2 Cir. 1940, 111 F. 2nd 611, Rev. on other grounds 1941, 312 U. S. 492, 61 S. Ct. 634, 85 L. Ed. 969;

Berry v. *U. S.*, 2 Cir. 1940, 111 F. 2nd 615, Rev. on other grounds 1941, 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945;
U. S. v. *Halliday*, 4 Cir. 1941, 116 F. 2nd 812, Rev. on other grounds 1942, 315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. 711;
Harvard University v. *Cassell*, App. D. C. 1941, 126 F. 2nd 6, Cert. den. 1942, 316 U. S. 675, 62 S. Ct. 1046, 86 L. Ed. 1749;
Lowden v. *Bell*, 8 Cir. 1943, 138 F. 2nd 558.

Therefore so long as there is ambiguity in this Rule which the Advisory Committee on Rules evidently intends to resolve in respondent's favor, as several of the Circuit Courts already have done to the Committee's approval, plaintiffs in failing to make out a case have not been deprived of any rights under an ambiguous rule.

The cases cited by plaintiffs do not sustain their contention that the Circuit Court had no authority to dismiss the complain. In *Hirsch* v. *Schwartz & Cohn*, it was the plaintiff who did not move for a directed verdict, and was held thereby to have conceded there was a fact question for the jury. He could hardly have moved for the dismissal of his own complaint. There was, however, no holding that an appellate court cannot dismiss a complaint when a defendant has moved for a dismissal on the trial, and has not moved for a directed verdict.

Slocum v. *N. Y. Life Ins. Co.*, has been held by this Court, in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, not to require that all cases be remanded for a new trial, as that decision applied only to the particular facts in that case. *Erie R. Co.* v. *Tompkins*, hold only that the law of the State is to be applied in the Federal Court. Under New York Law the Appellate Division and the Court of Appeals can dismiss a

complaint where a defendant fails to move for a directed verdict.

> *Emerich as admr.* v. *N. Y. C. R. Co.*, 295 N. Y. 932; *Middleton* v. *Whitridge*, 213 N. Y. 499, 507.

In the *Emerich* case, decided May 29, 1946, the infant intestate was killed while playing in defendant's railroad yard, the evidence being conflicting as to whether defendant permitted boys to play there. Plaintiff contended that defendant's failure to move for a directed verdict, or to take exception to the Trial Court's ruling to reserve decision on defendant's motions to dismiss the complaint, and to except to the charge, conceded the existence of a question of fact for the jury and thus established the law of the case. However, the Appellate Division dismissed the complaint, and the Court of Appeals upheld the dismissal. (This case appears in official weekly advance sheets No. 377, July 20, 1946, and not yet in bound volume.)

In the *Middleton* case, the court said:

> "The final judgment then which the Appellate Division is empowered to render is the one which the trial court should have rendered either upon a special or a general verdict, or upon a motion to dismiss the complaint or to direct a verdict. The error thus corrected is the error of the court, not of the jury. The province of the jury is not invaded by the correction of such an error and the rendition of the judgment which ought to have been rendered by the trial court."

See also Civil Practice Act, sec. 549.

Plaintiffs' proof was uncontradicted, both sides in effect resting at the close of plaintiffs' case; plaintiffs have had their full day in court; their evidence has properly been found insufficient; respondent at the close of the entire case renewed its motions for dismissal because thereof; and

duly excepted to the denial of its motions; and therefore, under the above decisions and holdings no injustice has been done to plaintiffs, and they should not be allowed to take advantage of any ambiguity.

POINT IV

The petition for a writ of certiorari should be denied.

WALTER X. CONNOR,
Counsel for Respondent.

HERBERT F. HASTINGS, JR.,
F. G. MANN,
Of Counsel.